Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-166

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN COLBY, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Angell v. *Flemming*, 291 F. 2d 72 4

Butler v. *Flemming*, 288 F. 2d 591 4

Harper v. *Flemming*, 288 F. 2d 61 4

Miller v. *Ribicoff*, 195 F. Supp. 534 4

Thompson v. *Weinberger*, 548 F. 2d 1122 4

Statutes and regulations:

Social Security Act, 42 U.S.C. 301 *et seq.* 1

Section 203(f)(5)(A), 42 U.S.C. 403(f)(5)(A) 3

Section 205(g), 42 U.S.C. 405(g) 2

20 C.F.R. 404.1026(a)(8) (1979) 1, 2

20 C.F.R. 404.1045 2

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-166

JOHN COLBY, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Secretary's regulation governing the method by which earnings are calculated in determining whether Social Security benefits should be reduced (20 C.F.R. 404.1026(a)(8) (1979))[1] unfairly distinguishes between self-employed persons and wage earners and is thus unauthorized by the Social Security Act, 42 U.S.C. 301 *et seq.*

1. Petitioner brought suit in the United States District Court for the Southern District of New York under

---

[1]20 C.F.R. 404.1026(a)(8) (1979) provided:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review a final determination of the Secretary of Health, Education, and Welfare ("the Secretary") that petitioner was overpaid $8,982.10 in retirement insurance benefits for the years 1974 through 1976 and that recovery thereof may not be waived (Pet. App. 4a). In those years, petitioner was employed as a traveling salesman and was paid $40 per week for expenses in addition to a commission (*id.* at 19a). Petitioner's true business expenses, however, exceeded the allowance, and in calculating his earnings for Social Security purposes he deducted his expenses in full as he would have been entitled to do had he been self-employed (*ibid.*).

Because petitioner was not self-employed, the Secretary, applying 20 C.F.R. 404.1026(a)(8) (1979), determined that petitioner's deductible business expenses were limited to the $40 per week identified by his employer. Accordingly, the Secretary disallowed so much of petitioner's claimed business deductions as exceeded that amount, recomputed his earnings and reduced his retirement benefits (Pet. App. 19a-20a). The district court granted the Secretary's motion for judgment on the pleadings, rejecting petitioner's contention that the

---

making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

This provision has been carried over in substantially the same form in 20 C.F.R. 404.1045:

> Amounts that your employer pays you specifically—either as advances or reimbursements—for traveling or for other ordinary and necessary expenses incurred, or reasonably expected to be incurred, in your employer's business are not wages. The employer must identify these travel and other expenses either by making a separate payment or by specifically stating the separate amounts if both wages and expense allowances are combined in a single payment.

challenged regulation is inconsistent with the Social Security Act (*id.* at 1a-16a). The court of appeals affirmed (*id.* at 17a-22a).

2. The decision below is correct and does not conflict with any decision of this Court or the courts of appeals.

a. The challenged regulation is a permissible exercise of administrative discretion in that it reasonably interprets Section 203(f)(5)(A) of the Act, 42 U.S.C. 403(f)(5)(A), which provides in pertinent part that "[a]n individual's earnings for a taxable year shall be (i) the sum of his *wages* for services rendered in such year and his *net* earnings from self-employment for such year * * * " (emphasis added). Moreover, the regulation's disparate treatment of wage earners and self-employed persons is consistent with the terms and purposes of the Act. As the court of appeals observed (Pet. App. 21a):

> [E]mployers are not required to pay Federal Insurance Contribution Act (F.I.C.A.) taxes on payments designated as reimbursements for expenses; employers therefore have an obvious incentive not to fix such allowances at a figure lower than the facts warrant. Moreover, an equally situated employee and self-employed worker are treated differently under contribution and benefit provisions of the Act. The employee pays less F.I.C.A. tax and receives higher benefits than a self-employed worker. But the self-employed individual who continues to work while receiving benefits is entitled to deduct all business expenses in computing his earnings for purposes of determining whether his benefits are excessive. The Regulation thus equalizes to a certain extent the disadvantages to self-employed workers as a result of other provisions of the Act.

b. The decision below is consistent with the decisions of other courts of appeals. In *Angell* v. *Flemming*, 291 F. 2d 72 (4th Cir. 1961), on which petitioner principally relies, the court of appeals reversed the Secretary's ruling that the employee's salary in its entirety constituted "wages" notwithstanding the employer's acknowledgment that the payments were in part a reimbursement for expenses. Here, the Secretary permitted the employee to deduct the $40 per week specifically identified by the employer as an expenses reimbursement. The other two cases cited by petitioner—*Harper* v. *Flemming*, 288 F. 2d 61 (4th Cir. 1961), and *Butler* v. *Flemming*, 288 F. 2d 591 (5th Cir. 1961)—are inapposite. At issue in *Harper* was the definition of "material participation" by the owner of a farm in the production and management of that farm for purposes of determining old age benefits under the Act. In *Butler*, the issue was whether the claimant was totally disabled within the meaning of the disability freeze provisions of the Act.[2]

On the other hand, *Thompson* v. *Weinberger*, 548 F. 2d 1122 (4th Cir. 1976), which petitioner seeks to minimize, provides substantial support for the decision below. In that case the court of appeals considered whether a salaried city council member receiving Social Security retirement benefits was entitled to exclude office and secretarial expenses from his gross income in determining excess earnings under the Act. The councilman sought to exclude those expenses even though the city had not identified any part of his $400 per month salary as reimbursement. While the Fourth Circuit declined to express an opinion on the question of deductibility of

---

[2]The passage that petitioner attributes (Pet. 5) to the Fifth Circuit in *Butler* is, in actuality, a quotation from *Miller* v. *Ribicoff*, 195 F. Supp. 534, 535 (W.D.S.C. 1961).

expenses for traveling salesmen, it upheld the regulation challenged herein as being reasonably related to the purposes of the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09